WR-51,197-03
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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EX PARTE	§	
	§	
	§	No. WR-51,197-03
	§	
JAMES AARON DYSON	§	

STATE'S SUGGESTION THAT THE COURT RECONSIDER ITS DECISION DISMISSING THE APPLICANT'S THIRD APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, and suggests that this Court reconsider its decision dismissing the applicant's false or misleading testimony claim raised in his 2019 writ application as subsequent writ barred and remand it for a merits review.

I.

The applicant was convicted of engaging in organized criminal activity by committing aggravated assault with a deadly weapon with the intent to establish, maintain or participate as a member of a criminal street gang. See Judgment; Indictment. The jury sentenced him to fifty years' confinement on January 30, 1998. See Judgment.

II.

The applicant alleges that the State violated his due process rights by presenting false or misleading testimony that he was a member of the R-13 criminal street gang as follows:

> Prosecutor's use of [Robert] Aguirre's testimony that Dyson "claimed" R-13 membership was guided and distorted by the prosecution to establish that Dyson was a member of a criminal street gang. According to Aguirre, who has only recently come forward, that the prosecutor guided his testimony to suggest more than what it actually meant that Aaron was a "poser" and not an initiated and accepted member of a "Mexican" street gang. Likewise, other sources have indicated that Aaron's membership would not have been possible. The result of this false testimony was harmful to Aaron since it represented the only direct evidence of his supposed gang membership. Naturally, the fact that Aguirre's testimony was the only direct evidence of Aaron's alleged gang membership goes to its materiality.

See Application, page 10. The State responded that that this claim should be dismissed as part of a subsequent writ application without addressing its merits. See State's Response, pages 3-7.[1] The State proposed findings of fact and conclusions of law that the applicant had not presented sufficient specific facts that the legal basis for his false or misleading testimony claim was unavailable when he filed his original writ application. See State's Proposed Findings of Fact and

1 The applicant previously filed applications for writs of habeas in 2001 and 2006 raising claims that he was denied effective assistance of trial counsel, denied meaningful cross-examination of the victim Joe Cruz who plead the Fifth Amendment during his cross-examination, and jury misconduct occurred because one juror was arrested during his trial. See ***Ex parte Dyson***, No. C-4-005309-0657742-A & ***Ex parte Dyson***, No. C-4-007671-0657742-B (applications). His 2001 writ application was denied on its merits, and his 2006 writ application was dismissed as a subsequent writ application. See ***Ex parte Dyson***, Nos. WR-51,197-01 & WR-51,197-02.

Conclusions of Law, pages 4 & 7.[2] On June 6, 2019, this Court dismissed this application as a subsequent writ application. See ***Ex parte Dyson***, WR-51,197-03.

III.

Although the rules of appellate procedure prohibit the parties from filing any motion for rehearing or reconsideration of an order dismissing a habeas corpus application, the Court has the authority to reconsider a case on its own initiative. ***Ex parte Robertson***, 603 S.W.3d 427, 428 (Tex. Crim. App. 2020); ***Ex parte Moreno***, 245 S.W.3d 419, 427 (Tex. Crim. App. 2008); **Tex. R. App. P. 79.2(d)**. Reconsideration is an unusual exercise of authority and is undertaken only in extraordinary circumstances. ***Ex parte Robertson***, 603 S.W.3d at 428; ***Ex parte Moreno***, 245 S.W.3d at 427. This Court should exercise that authority and reconsider the applicant's false or misleading testimony claim.

IV.

A defendant's due process rights are violated when the State uses material false testimony to obtain a conviction or sentence, regardless of whether its actions

2 These conclusions included long-standing caselaw that the State may not obtain a conviction through the knowing use of perjured testimony and that the knowing use of false testimony constitutes prosecutorial misconduct. See State's Proposed Findings of Fact and Conclusions of Law, page 6. Perjury is not the same claim as the unknowing use of false evidence. ***Ukwuachu v. State***, ___ S.W.3d ___, 2020 WL 6750464, at *6 (Tex. Crim. App. November 18, 2020).

are done knowingly or unknowingly. ***Ukwuachu v. State***, 2020 WL 6750464, at *6; ***Ex parte Weinstein***, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014); ***Ex parte Chavez***, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012); ***Ex parte Chabot***, 300 S.W.3d 768, 770-72 (Tex. Crim. App. 2009). See also **U.S. Const. amend. XIV**. Due process dictates that a defendant's conviction be based on truthful testimony or, alternatively, not be affected by false testimony. ***Ex parte Weinstein***, 421 S.W.3d at 666; ***Ex parte Chavez***, 371 S.W.3d 207. Good or bad faith by a witness or the State is not relevant to a false or misleading testimony due process analysis. ***Ukwuachu v. State***, 2020 WL 6750464, at *6; ***Ex parte Weinstein***, 421 S.W.3d at 666.[3]

This Court explicitly recognized due process claims for the unknowing use of false or misleading testimony in its 2009 *Chabot* decision. See ***Ex parte Chavez***, 371 S.W.3d at 205 (*citing* ***Ex parte Chabot***, 300 S.W.3d at 771-72). These claims constitute a new previously-unavailable legal basis because prior due process claims (such as perjury) required a knowing use of false testimony, and because *Chabot* established a more easily-obtainable materiality or harm standard. ***Ex parte Chavez***, 371 S.W.3d at 205-07. The subsequent writ bar does not absolutely preclude consideration of unknowing-use false testimony claims where the original

3 This due process ground is much broader than perjury since the only consideration is whether the testimony is false or misleading. ***Ex parte Weinstein***, 421 S.W.3d at 665-66; ***Ex parte Chavez***, 371 S.W.3d at 208.

application pre-dates the *Chabot* decision. ***Ex parte Chavez***, 371 S.W.3d at 207.

The applicant's original application was filed on March 29, 2001 and denied on February 13, 2002. See ***Ex parte Dyson***, No. C-4-005309-0657742-A & WR-51,197-01. His second application was filed on April 17, 2006 and dismissed on November 15, 2006. See ***Ex parte Dyson***, No. C-4-007671-0657742-B & WR-51,197-02. Since both prior applications were filed and resolved pre-*Chabot*, those applications should not have been the basis for barring consideration of the applicant's false or misleading testimony claim.

V.

Habeas corpus applications must state sufficient specific facts which, if proven true, would enable a court to determine from its face that the allegation merits further inquiry. ***Ex parte Staley***, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005); **Tex. Code Crim. Proc. art. 11.07, §4(a)**. It is not enough that a certain legal claim was "unavailable" when the applicant filed his earlier application; the facts must establish a cognizable claim based on formerly "unavailable law" to overcome the subsequent writ bar. ***Ex parte Oranday-Garcia***, 410 S.W.3d 865, 867–68 (Tex. Crim. App. 2013); ***Ex parte Staley***, 160 S.W.3d at 63-64. An applicant raising a false or misleading testimony claim in a subsequent writ application must still make

a *prima facie* showing of both falsity and materiality to receive a merits review.[4]

A.

A false or misleading testimony claim's first inquiry is whether the testimony, considering the entire record, leaves the fact-finder with a false or misleading impression. ***Ukwuachu v. State***, 2020 WL 6750464, at *6; ***Ex parte Chaney***, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018); ***Ex parte Weinstein***, 421 S.W.3d at 666. To prove this falsity prong, the record must contain some credible evidence that clearly undermines the evidence adduced at trial; thereby, demonstrating that the challenged evidence is, in fact, false. ***Ukwuachu v. State***, 2020 WL 6750464, at *6. While a variety of evidence may serve to demonstrate the falsity of evidence adduced at trial, that evidence must be definitive or highly persuasive to undermine the trial evidence's trustworthiness. ***Ukwuachu v. State***, 2020 WL 6750464, at *6; ***Ex parte De La Cruz***, 466 S.W.3d 855, 867 (Tex. Crim. App. 2015). Finally, an applicant must prove this false or misleading impression by a preponderance of the evidence. ***Ex parte Chaney***, 563 S.W.3d at 263; ***Ex parte De La Cruz***, 466 S.W.3d at 871.

To support its gang membership/motivation theory, the State presented the following evidence:

4 See ***Ex parte Fierro***, 2019 WL 6896993, at *4 (Tex. Crim. App. Dec. 18, 2019) (unpublished).

- The applicant yelled that the victim (Joe Cruz) had shot his "homeboy" before shooting him. (R.R. V:21).
- The applicant and his friends had matching tattoos memorializing Omar Alvarado, who had been killed by Joe Cruz. (R.R. V:103-04).
- Robert Aguirre's testimony that the applicant "claimed" R-13 membership and flashed gang signs. (R.R. V:98, 105).
- Robert Aguirre's testimony that the applicant was possibly an R-13 gang member. (R.R. V:116).
- Gang officer testimony that the applicant was a full-fledged R-13 gang member based on his association with gang members, involvement in gang-related criminal activity and hearsay information from school officials. (R.R. V:146, 147-49 163).
- Gang officer testimony that "homeboy" meant "fellow gang member" and that the term was primarily used among gang members. (R.R. V:164).
- The applicant being photographed two years earlier with some Asian gang members. (R.R. V:152-53).

Robert Aguirre has since retracted any testimony suggesting that the applicant belonged to the R-13 gang; specifically, stating that:

- The applicant was never initiated into R-13 or did the "work" required to attain gang membership;
- The applicant was fascinated by the gangster lifestyle but had no actual desire to belong to a gang;
- The applicant flashed gang signs and posed as a gang member to show off and gain attention from their high school classmates; and
- The applicant never "posed" around any actual gang members.

See Application, Exhibit A. Mr. Aguirre explained that the State misinterpreted the use of the term "homeboy" by him, the applicant and Omar Alvarado as an indication that they were gang members when, in fact, they were just part of a close-knit group of friends who used the term "homeboy" to mean "good friend". See Application, Exhibit A. Mr. Aguirre felt pressured to imply that the applicant

was a gang member without understanding its legal significance. See Application, Exhibit A. The applicant attached other evidence undermining the truthfulness of any testimony that this shooting was gang-related:

- Joel Arredondo, a founder of R-13, stated that the applicant was never a member of his gang and that he never did any "jobs" for his gang. See Application, Exhibit B.
- Joe Cruz wrote in 2005 that he does not believe, and has never believed, that his shooting was gang-related. See Application, Exhibit D.

Put simply, the applicant presented *prima facie* evidence indicating the falsity of any testimony suggesting that he belonged to a gang or that he shot Joe Cruz for gang reasons.[5]

B.

A false or misleading testimony claim's second inquiry is whether the false or misleading testimony was material. ***Ex parte Weinstein***, 421 S.W.3d at 665. False testimony is material only if, after considering the entire record, there is a reasonable likelihood that the testimony influenced the jury or affected the applicant's conviction or sentence. ***Ex parte Weinstein***, 421 S.W.3d at 665; ***Ex parte Chavez***, 371 S.W.3d at 209-10. An applicant must demonstrate materiality

5 The State has also recently received a letter written by a second former R-13 member who stated that he knew the applicant and Omar Alvarado since elementary school, that the applicant and Alvarado were not R-13 gang members, and that the applicant's shooting of Joe Cruz was not gang related. See State's Exhibit A (Ramon Munoz Letter). The State has confirmed the veracity of this letter, as well as Mr. Aguirre's retractions, by telephonic interview.

by a preponderance of the evidence. ***Ex parte Weinstein***, 421 S.W.3d at 665.

Whether the applicant belonged to the R-13 criminal street gang, and whether he shot Joe Cruz in furtherance of that gang membership were the only contested issues in his trial; the applicant's identity as the shooter was never contested. (R.R. V:10-12, 137-40, 141). In its opening statement, the State referred to the applicant and Omar Alvarado as R-13 gang members and described this case as a "retaliation gang offense". (R.R. V:10). The State emphasized the gang officer testimony identifying the applicant and Alvarado as gang members in opening argument and asserted that this shooting would not have happened but for the applicant's allegiance to R-13 and its other members. (R.R. VI:131-32). The State closed its case with an impassioned argument about gang warfare in the streets. (R.R. VI:151-53). There is no question that the truthfulness of evidence regarding whether the applicant belonged to a gang or was motivated by gang membership was a material issue in his trial – and the difference between the applicant being convicted of engaging in organized criminal activity versus being convicted of the lesser offense of aggravated assault with a deadly weapon.

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court reconsider its prior decision to dismiss the applicant's false or misleading testimony claim and remand it for a merits review.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

/s/ Steven W. Conder
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CERTIFICATE OF SERVICE

This motion was electronically served on the applicant's writ counsel, Mr. Chris Self (chris@selfhoang.com), 2189 Cypress Creek Parkway, Suite 100, Houston, Texas 77090, and mailed to the applicant, Mr. James Aaron Dyson, TDCJ-ID# 00815938, Coffield Unit, 2661 FM 2054, Tennessee Colony, Texas 75884, on January 6, 2021.

/s/ Steven W. Conder
STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements and word-count limitations of Tex. R. App. P. 73.1. It has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains

approximately 2214 words, excluding any exempted parts, as computed by Word 2016.

/s/ Steven W. Conder
STEVEN W. CONDER

A

April 21, 2018

Elizabeth Henneke
Attorney at Law
1411 West Avn. Suite 200
Austin Tx 78701

RE: James Aaron Dyson

Dear Mrs Henneke,

I was recently contacted by an activist named Wolf Sittler, in regards to my friendship with Aaron Dyson and over his conviction. During this conversation I realized I needed to come to you to clarify somethings that should have been brought up twenty years ago.

I met and became friends with Aaron and Omar Alvarado at Birdville Elementary School. That friendship lasted up until Omars murder in '96 and Aarons crime in '97. I moved from Haltom city to Diamond Hill in 1995 when I was 15 years old. It was then that I made friends with boys my age in a gang called Raza 13. I made the mistake of joining them. I was still friends with Omar and Aaron and a few others even after my move. However, at no point in time was Omar or Aaron a member. From what I remember neither wanted anything to do with that part of my life. The only connection they would even have between them and Raza 13 was me. The gang has long been dismembered and most have grown to start family, businesses and many have accepted Christ in their lives.

During the time leading up to Aarons trial, I made it known that I was willing to testify on behalf of the defense if I was needed bit I was never asked. I seen how hard Omars death was on Aaron. Omar was a good kid and a great friend. His Loss was hard on us all but Aaron took it the hardest. I was willing to testify that Omars death and Aarons crime was in no way gang related but no one ever contacted me. Aaron is guilty of shooting the guy that killed his best friend, but it had nothing to do with gangs.

Sincerely,

Ramon Muñoz,
2117 Nelson Avn.
Fort Worth Tx

Ramon Muñoz
4/23/18

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